

Illinois Health Information Exchange Data Sharing Agreement

This Illinois Health Information Exchange Data Sharing Agreement (“Agreement”) is made effective this ___ day of _____, 2013 (the “Effective Date”) by and between the State of Illinois Office of Health Information Technology (“OHIT”), an instrumentality of the State of Illinois, and _____ (“Participant”). OHIT and the Participant may be referred to herein as a “party” or “parties”.

PREAMBLE:

WHEREAS, OHIT has established an electronic patient data exchange system, the Illinois Health Information Exchange (“ILHIE”), to allow Authorized Users to electronically exchange patient information; and

WHEREAS, Participants have established electronic patient data exchange systems to allow Authorized Users to electronically exchange patient information; and

WHEREAS, OHIT wishes to provide the Participant certain ILHIE services involving the exchange of patient information; and

WHEREAS, OHIT and certain Participants (e.g. regional health information organizations) have entered into agreements with health care entities under which each entity has agreed to provide Participants with access to patient information in the custody of participating entities; and

WHEREAS, Participants desire to obtain information located on each other’s Systems to allow Authorized Users to access patient information for the continuing care and treatment of patients and beneficiaries, payment of claims and healthcare operations; and

WHEREAS, Participant and OHIT desire to maintain the privacy and security of Protected Information exchanged through the ILHIE;

NOW THEREFORE, in consideration of the foregoing premises and the mutual covenants and agreements set forth below, and other good and valuable consideration, the receipt and legal sufficiency of which are hereby acknowledged, and wishing to be legally bound hereby, the parties hereto agree as follows:

1. **Purpose and Scope.** This Agreement governs how Protected Information may be used and disclosed by the Participant using the ILHIE. It is the intent of the Participant and OHIT to protect the confidentiality and security of all Protected Information exchanged through the ILHIE subject to this Agreement, in accordance with applicable State and federal law, including without limitation, the federal Health Insurance Portability and Accountability Act of 1996 and its implementing regulations on privacy and security found at 45 C.F.R. Parts 160 and 164, as the same may be amended from time to time, including modifications to the HIPAA Security and Privacy Rules arising from the Health Information Technology for Economic and Clinical Health (HITECH) Act (Pub. L. 111-5) (“HIPAA”). This Agreement shall not be considered to limit or apply to the exchange of information that does not involve the electronic transmission of Protected Information from one System to another, such as information provided through paper or other hard copies.

2. **Definitions.** Terms used, but not otherwise defined, in this Agreement shall have the same meaning as those terms in HIPAA. When presented as capitalized terms in this Agreement, the following terms have the meanings indicated below:
- a. *“Agreement”* shall mean this Illinois Health Information Exchange Data Sharing Agreement and all agreements attached to or incorporated therein.
 - b. *“Authorized User”* shall mean a Participant’s employees, agents, assigns, representatives, independent contractors, or other persons or entities authorized by such Participant, under the procedures set forth in sections 5(a) and 3(b), to access, use or disclose Protected Information from another Participant’s System. Consistent with the ILHIE intellectual property license (section 8a), an Authorized User must be a person or entity that uses Services for accessing or transmitting Protected Information that was created (a) by a healthcare provider in Illinois, or (b) by a healthcare provider outside of Illinois and that is accessed by or provided to users located within Illinois.
 - c. *“Breach”* shall mean acquisition, access, use or disclosure of Protected Information in a manner which compromises the security or privacy of such information, except as provided in 45 CFR § 164.402 of the HIPAA regulations. An access, use or disclosure of Protected Information in a manner not permitted by this Agreement or HIPAA regulations is presumed to be a Breach, unless the breaching party demonstrates there is a low probability that Protected Information has been compromised based on a risk assessment using the factors laid out in 45 CFR § 164.402 of the HIPAA regulations.
 - d. *“Business Associate or BA”* shall mean OHIT, as a health information organization on behalf of the Participant, who receives, maintains or transmits Protected Information to Other Participants and requires routine access to such Protected Information by the Participant and Other Participants. *“Business Associate or BA”* shall also have the general meaning set forth in 45 CFR § 160.103 of the HIPAA regulations.
 - e. *“Governmental Participants”* shall mean collectively those Participants that are local, state or Federal agencies.
 - f. *“HIPAA”* has the meaning set forth in Section 1.
 - g. *“Other Participant”* shall mean any individual or entity that has signed an agreement materially similar to this Agreement to participate in the ILHIE. *“Other Participant”* also has the meaning set forth in Section 15.
 - h. *“Participant”* shall mean any individual or entity that has signed this Agreement. Consistent with the ILHIE intellectual property license (section 8a), a Participant must be a person or entity that uses Services for accessing or transmitting Protected Information that was created (a) by a healthcare provider in Illinois, or (b) by a healthcare provider outside of Illinois and that is accessed by or provided to users located within Illinois.
 - i. *“Person”* shall mean any individual person or entity.
 - j. *“PHI”* shall mean “protected health information” shared under this Agreement, as that phrase is defined in 45 CFR § 160.103 of the HIPAA regulations.

- k. *“Proprietary Information”* shall mean all of the materials, information and ideas of a Participant or OHIT including, without limitation: patient names, patient lists, patient records, patient information, operating methods and information, accounting and financial information, marketing and pricing information and materials, internal publications and memoranda and, if notice thereof is given, other matters considered confidential by a Participant or OHIT. Proprietary Information shall not include information which: (i) is readily available or can be readily ascertained through public sources; (ii) a Participant or OHIT has previously received from another party unrelated to this Agreement; or (iii) is information received by a Participant or OHIT that is used in compliance with Section 3.a. below and integrated into the records of the receiving Participant.
 - l. *“Protected Information”* shall mean PHI and Proprietary Information shared under this Agreement.
 - m. *“Services”* shall mean all ILHIE data services provided to the Participant pursuant to this Agreement described in Attachment 2.
 - n. *“State”* shall mean the State of Illinois.
 - o. *“System”* shall mean software, portal, platform, or other electronic medium controlled or utilized by a Participant through which or by which the Participant exchanges information under this Agreement. For purposes of this definition, it shall not matter whether the Participant controls or utilizes the software, portal, platform or other medium through ownership, lease, license, or otherwise.
3. **Use of and Access to Protected Information.**
- a. **Permitted Uses and Disclosures.** The Participant agrees to permit access to the Protected Information, and for OHIT, as a Business Associate (“BA”) pursuant to the BA Agreement in Attachment 3, to use and disclose such Protected Information, for the purposes of treatment, payment, and health care operations or pursuant to an authorization as those terms are defined in HIPAA, and any other purposes permitted to the Illinois Health Information Exchange Authority (“Authority”) in furtherance of the Authority’s rights and duties under Illinois law, including the Illinois Health Information Exchange and Technology Act (20 ILCS 3860/), including the collection, aggregation, formatting and/or transmission of health care data, as PHI or in de-identified format, for public health reporting, meaningful use reporting and medical research purposes. The Participant may reasonably use and disclose Protected Information if necessary for proper management and administration or to carry out their legal responsibilities. OHIT and each Participant agrees not to access, use or further disclose Protected Information other than as authorized by this Agreement, including Attachment 3, and permitted by law.
 - b. **Authorized Users.**
 - i. **Breach investigation.** In the event that the Participant has reasonable suspicion of a Breach by any Other Participant or one or more of its Authorized Users, following reasonable request, the Participant suspecting such Breach shall receive from the Other Participant the names of those Authorized Users who have accessed the System of the Participant suspecting the Breach during the

relevant period. Such request shall include a brief description of the basis for its suspicions and likely possible dates of such access.

- ii. **Selection.** Participant shall use reasonable care in selecting Authorized Users and shall require that they act in compliance with relevant provisions of this Agreement.
- iii. **Sanctions.** Participant shall apply appropriate sanctions against any Authorized User who fails to comply with the requirements of this Agreement.
- iv. **Access controls.** Participant shall immediately remove an Authorized User's access to Protected Information if the Authorized User is determined by the Participant to no longer qualify as an "Authorized User." Participant will be responsible for initiating, updating, monitoring, controlling and removing or suspending access of its Authorized Users in accordance with the law and any requirements contained in this Agreement, including but not limited to Section 5 (Privacy and Security Safeguards).
- v. **Agreements with Authorized Users.** Each Participant has valid and enforceable agreements with each of its Authorized Users that require the Authorized User to, at a minimum: (i) comply with all applicable law; (ii) reasonably cooperate with the Participant on issues related to this Agreement; (iii) use or disclose Protected Information only for a permitted purpose; (iv) use Protected Information received from another Participant or Authorized User in accordance with the terms and conditions of this Agreement; (v) as soon as reasonably practicable after determining that a Breach occurred, report such Breach to the Participant; and (vi) refrain from disclosing to any other person any passwords or other security measures issued to the Authorized User by the Participant. Notwithstanding the foregoing, for Authorized Users who are employed by a Participant or who have agreements with the Participant which became effective prior to the Effective Date, compliance with this Section 3.b.v may be satisfied through written policies and procedures that address items (i) through (vi) of this Section 3.b.v so long as the Participant can document that there is a written requirement that the Authorized User must comply with the policies and procedures.
- vi. **Business Associate of Participant.** Participant shall require that any Authorized User that is a Business Associate shall enter into a Business Associate Agreement or an agreement with protections against disclosure at least equal to those required to be in a Business Associate Agreement.

c. **Access to Protected Information.**

- i. **Data available.** Under this Agreement, the Participant will make available Protected Information maintained in a designated record set that is generally accessible in electronic format and is maintained on the Participant's System. The Participant acknowledges that the Protected Information provided is drawn from numerous sources. Certain categories of information, including but not limited to HIV status, mental health records, substance abuse records and genetic information, may be more sensitive and may be accorded extra protections under

State and federal law. For this or other reasons, the Protected Information provided may not include an entire record.

- ii. **Retention.** Participant shall maintain Protected Information on its System for the greater of six (6) years or as required by applicable law.
- iii. **Delivery.** The Participant shall provide Protected Information in a timely matter. Participant shall provide concurrent notice to OHIT and, to the extent known to Participant, affected Other Participants of any impact on the availability of Protected Information for an extended period of time due to changes to its System upon attempted access by any Other Participant.
- iv. **Patient authorizations.** The Participant agrees and acknowledges that it will secure all necessary patient authorizations or consents, or any other permissions, or take such other actions as may be necessary or desirable under federal or state law to lawfully release the Participant's Protected Information to Other Participants through the ILHIE. Participant warrants that it will comply with all applicable laws and government regulations affecting its use of the ILHIE, and OHIT shall not have any responsibility relating to Participant therefor, including, without limitation, any responsibility to advise Participant of Participant's responsibility in complying with any laws or governmental regulations affecting its use of the ILHIE.
- v. **CLIA.** In accordance with the Clinical Laboratory Improvement Amendments of 1988 (42 U.S.C. §263a), the regulations promulgated thereunder (42 CFR Part 493) and corresponding state laws (collectively "CLIA"), each Participant who will access clinical laboratory results on behalf of an Authorized User represents and warrants that it has obtained, and shall maintain through the term of the Agreement, the written authorization of those providers who are Authorized Users and will access such results. Such authorization shall contain a statement that the Authorized User has authorized the Participant to access result reports and other patient information directly from such Authorized User's ancillary providers, such as reference clinical laboratories. As a condition of participation hereunder, the Participant will also ensure that each such Authorized User has agreed in writing that the Protected Information accessed hereunder does not constitute a "report of record".
- vi. **Data corrections.** Subject to the provisions of Section 7.d (Participant disclaimer), the Participant understands that this Agreement primarily depends on the Participant to reasonably determine that information disclosed is accurate and complete. If Participant becomes aware of any material inaccuracies in its own Protected Information or System, it agrees to communicate such inaccuracy to OHIT and, to the extent known to Participant, affected Other Participants as soon as reasonably possible. If Participant is unable to provide all information requested due to material inaccuracies, it shall provide a statement with any Protected Information indicating such limitations
- vii. **Granular restrictions.** In the event that Participant shall agree to place additional restrictions on Protected Information of an individual, Participant shall be solely liable for maintaining such restrictions. Participant agrees and acknowledges that if the Participant receives Protected Information under this

Agreement, the Participant may assume that, and treat such Protected Information as if, there are no additional restrictions placed on such Protected Information except as otherwise stated in this Agreement or required by relevant law.

- viii. **Opt-Out consent model.** The ILHIE Authority has adopted a policy to provide patients the option to “opt-out” of further disclosure by ILHIE of a patient’s medical information, except to the extent permitted by applicable law. OHIT shall allow Participant to access the ILHIE to obtain PHI concerning a patient, only if the patient who is the subject of the PHI either: (a) has *not* opted-out of participation in the ILHIE; or (b) if such patient initially opted-out, he or she has reversed his or her earlier opt-out status and has not subsequently opted-out again; or (c) further disclosure is permitted by applicable law, such as in patient emergency healthcare treatment (“break-the-glass”) situations.
 - A. **Procedure.** Participant in consultation with OHIT shall implement as soon as reasonably practicable, but no later than as required by applicable law, a procedure that (i) informs the patient of his or her right to not participate in the ILHIE and permits the patient an opportunity to opt-out of participation in the ILHIE and (ii) informs the patient of his or her ability to subsequently reverse a prior decision to opt-out of participation and permits the patient the opportunity to do so. Subject to the foregoing, Participant shall implement this process at the first care event with the patient after the Effective Date.
 - B. **Registration of Opt-Out.** If a patient has elected to opt-out of participation, Participant must register such preference with the ILHIE as soon as reasonably practicable, and in no event more than one (1) business day after the patient has opted-out. Any opt-out decision shall be effective from the moment it has been registered with and processed by the ILHIE with respect to all of the patient’s data in the ILHIE on a going-forward basis. ILHIE shall implement a procedure to register a patient’s opt-out and to reverse an opt-out upon Participant’s submission of the patient’s preference to reverse the previous opt-out.
 - C. **Action by Third Party on behalf of Patient.** References to any act, opt-out, reversal of opt-out, consent or other decision by a “patient” in this Agreement includes any act or decision by a guardian, personal representative, surrogate or other third party who has the power under applicable law to take the action or make the decision on behalf of the individual who is the patient.
 - D. **Further Policies.** OHIT in consultation with Participants shall develop further commercially reasonable procedures to implement the Authority’s “opt-out” policy.
 - E. **ILHIE Information.** OHIT shall provide additional information to Participants regarding the ILHIE for each Participant to reflect in its Notice of Privacy Practices and in materials provided to patients regarding the ILHIE and the patient’s “opt-out” rights.
- d. **Ownership.** Disclosure of Protected Information under this Agreement does not change the ownership of such information under State and federal law. If Protected Information has been used or disclosed for treatment, payment, or health care operations, it may thereafter be integrated into the records of the recipient. This Agreement does not grant to

Participant any rights in the System or any of the technology used to create, operate, enhance or maintain the System of any Other Participant.

4. **Participant Requirements.** Participant, whether providing, receiving or using Protected Information under this Agreement, shall:
 - a. **Privacy and security policies.** establish and implement appropriate policies and procedures, including such policies and procedures prescribed by OHIT or the Illinois Health Information Exchange Authority from time to time with respect to all Participants, to prevent unauthorized access, use and disclosure of Protected Information and ensure that such policies and procedures do not conflict with and are not less restrictive than this Agreement;
 - b. **Access monitoring.** regularly monitor and audit access to Protected Information and take reasonable steps to pursue, address and mitigate any breach or other privacy and security issues detected by such monitoring;
 - c. **Breach notification.** notify OHIT and the affected Other Participants of which Participant has knowledge or reasonably should know, as soon as reasonably possible but no later than ten (10) calendar days after discovery of any Breach, take all reasonable steps to evaluate the risk of compromise to Protected Information pursuant to 45 CFR § 164.402 and mitigate the Breach (for purposes of this subsection c., “affected Other Participants” shall include any Other Participant regarding which there is a reasonable possibility that the Other Participant’s System or data on that System could be negatively impacted by the Breach). Participant agrees to assume all mitigation costs associated with Breaches caused by acts or omissions by the Participant and/or its subcontractors and business associates, but not including OHIT. OHIT agrees to assume all mitigation costs associated with Breaches caused by the acts or omissions of OHIT and/or its subcontractors. The parties acknowledge that no notification is required hereunder regarding the ongoing existence and occurrence or attempts of unsuccessful security incidents, meaning pings and other broadcast attacks on a party’s firewalls, port scans, unsuccessful log-on attempts, denial of service attacks, and any combination of the above, so long as no such incident results in unauthorized access, use or disclosure of PHI. OHIT may facilitate conference calls and other mechanisms to help Participant and any Other Participants coordinate their responses and communications regarding Breaches so that all of them are aware of mitigation efforts and costs, and the Breach is generally described in the same way in press releases and government filings;
 - d. **Books and records.** make its internal practices, books, and records relating to uses and disclosures of Protected Information available to the Secretary of the U.S. Department of Health and Human Services or his/her designee, as necessary to comply with HIPAA or other applicable State and federal law;
 - e. **Training.** provide all of its Authorized Users with appropriate education and training on the requirements of this Agreement; and
 - f. **Copy of policies.** provide upon request, copies or detailed summaries of its privacy and security policies and procedures to OHIT and Other Participants.
5. **Privacy and Security Safeguards.**

- a. **Safeguards.** Participant will use and maintain appropriate administrative, technical and physical safeguards to protect the confidentiality, integrity, and availability of Protected Information and to prevent the use or disclosure of any Protected Information received from or on behalf of Other Participants other than as permitted or required by federal or State law and this Agreement. To that end, Participant shall: (i) provide for appropriate identification and authentication of Authorized Users; (ii) provide appropriate access authorization; (iii) guard against unauthorized access to Protected Information; and (iv) provide appropriate security audit controls and documentation.
- b. **Sanctions.** Participant shall apply appropriate sanctions against any person, subject to the Participant's privacy and security policies and procedures, who fails to comply with such policies and procedures. The type and severity of sanctions applied shall be in accordance with the Participant's privacy and security policies and procedures. Participant shall make employees, agents, and contractors aware that certain violations may result in notification by a Participant to law enforcement officials as well as regulatory, accreditation and licensure organizations.
- c. **Agents.** Participant shall require that its agents, including without limitation subcontractors, to whom Protected Information is provided under this Agreement, agree to the same restrictions and conditions that apply to the Participant with respect to such information including, without limitation, those set forth in Section 9 (Proprietary Information) below.
- d. **Access denials.** Participant may, at its discretion, deny access to any person, including without limitation any Other Participant or Authorized User, the Participant reasonably believes has accessed, used, or disclosed Protected Information other than as permitted under this Agreement. Participant shall promptly notify OHIT and, to the extent known to Participant, affected Other Participants of denial of access to its System to Other Participant or an Authorized User of such Other Participant.
- e. **HIPAA applicability.** The Participant and OHIT agrees and acknowledges that a minimum standard of privacy and security is required to protect the Protected Information regardless of whether or not a Participant or OHIT is a "covered entity" or "business associate" as defined under HIPAA; OHIT and each Participant shall comply with the requirements of HIPAA as though each were a "covered entity" under HIPAA except to the extent that such party is a "business associate" under HIPAA and complies with the requirements of a valid business associate agreement. Because Participant is limited to exchanging Protected Information through the ILHIE for only permitted purposes, Participant shall not become a Business Associate of any Other Participant by virtue of signing this Agreement or exchanging Protected Information hereunder. OHIT shall become a Business Associate of the Participant with the incorporation of Attachment 3 into this Agreement. To support the privacy, confidentiality, and security of the Protected Information and the ILHIE, Participant and OHIT shall at all times comply with HIPAA with respect to the ILHIE.

6. **Term and Termination.**

- a. **Term.** The term of this Agreement shall commence as of the Effective Date and shall continue in full force and effect for one (1) year from such date. Thereafter, the Agreement will automatically renew for additional one (1) year periods, provided that

either party may terminate the renewal of the Agreement without cause by providing thirty (30) days' prior written notice.

b. **Immediate Termination.**

- i. Participant and OHIT shall have the right to immediately terminate this Agreement (x) if required by Section 9 below (Proprietary Information) or (y) to comply with any legal order, ruling, opinion, procedure, policy, or other guidance issue, or proposed to be issued, by any federal or State agency, or (z) to comply with any provision of law, regulation or any requirement of accreditation, tax-exemption, federally funded health care program participation or licensure which (i) invalidates or is inconsistent with the provisions of this Agreement; (ii) would cause Participant to be in violation of the law; or (iii) jeopardizes the good standing status of licensure, accreditation or participation in any federally or State funded health care program, including without limitation Medicare and Medicaid programs.
- ii. OHIT shall have the right to immediately terminate this Agreement if (x) any agreement by and between OHIT and a third party vendor that provides technology required to operate or maintain the ILHIE expires or terminates for any reason, or (y) OHIT in its discretion determines that its performance of a material obligation under this Agreement is dependent on a governmental funding source, and such governmental funding fails or is insufficient for any reason.

c. **Termination with Cause.** Notwithstanding any other provision of this Agreement, OHIT and any Participant may terminate its participation in this Agreement if OHIT or Other Participant has materially violated its responsibilities under this Agreement and has failed to secure satisfactory assurances from OHIT or Other Participants within ten (10) days of written notice of such material violation that reasonable steps are being taken to effect a cure, and in any event: (i) such cure will be completed no later than thirty (30) days from notice of such material violation; and (ii) OHIT or the Other Participant has taken reasonable steps to prevent the recurrence of such material violation.

d. **Termination of Access to Protected Information.** Notwithstanding subsection c. above, OHIT and each Participant reserves the right to terminate immediately any Other Participant's access to Protected Information at any time if OHIT or the Participant has reason to believe that any Other Participant has suffered a Breach of the security of its System, has violated any of the terms of this Agreement, including without limitation accessing any information that a Participant would not otherwise be authorized to receive pursuant to this Agreement, improperly disclosing Protected Information or failing to abide by appropriate policies and procedures of the ILHIE. Participant shall promptly notify OHIT and the affected Other Participants of the termination of access to its System to the Other Participant.

e. **Remedies for Breach.** The Participant agrees that money damages may not be a sufficient remedy for any breach of this Agreement regarding the unauthorized or improper disclosure of Protected Information and that, in addition to all other available legal or equitable remedies, the non-breaching Participant will be entitled to equitable relief, including injunction and specific performance, for any Breach of the provisions of this Agreement.

- f. **Effect of Termination.** Upon Participant's withdrawal or termination, the Protected Information stored by Participant or OHIT shall no longer be accessible by the Other Participants. Following the termination of this Agreement, any and all Protected Information shall continue to be subject to the provisions of this Agreement with regard to the handling of Protected Information including, without limitation, provisions regarding Proprietary Information, privacy and security.

7. **Warranties, Disclaimers, Indemnification and Limitation of Liability.**

- a. **OHIT express warranties.** OHIT represents, warrants and covenants the following:
 - i. The Services shall comply with all federal and state laws, regulations and ordinances pertaining to the Services.
 - ii. To the best of OHIT's knowledge the Services shall be of good title and be free and clear of all liens and encumbrances, and not infringe any patent, copyright or other intellectual property rights of any third party.
 - iii. The Services will be free, at the time of delivery, of any harmful code (i.e. computer viruses, worms, trap doors, time bombs, disabling code, or any similar malicious mechanism designed to interfere with the intended operation of, or cause damage to, computers, data, or software).
- b. **Participant express warranties.** Participant represents, warrants and covenants the following:
 - i. **Accurate Participant Information.** Except to the extent prohibited by applicable law, each Participant has provided, and shall continue to provide, OHIT with all information reasonably requested by OHIT and needed by OHIT to discharge its duties under this Agreement or applicable law. Any information provided by a Participant to OHIT shall be responsive and accurate. Each Participant shall provide notice to OHIT if any information provided by the Participant to OHIT materially changes. Each Participant acknowledges that OHIT reserves the right to confirm or otherwise verify or check, in its sole discretion, the completeness and accuracy of any information provided by a Participant at any time and each Participant shall reasonably cooperate with OHIT in such actions, given reasonable prior notice.
 - ii. **Execution of Agreement.** Prior to exchanging Protected Information with other Participants, each Participant shall have executed this Agreement and returned an executed copy of this Agreement to OHIT. In doing so, the Participant affirms that it has full power and authority to enter into and perform this Agreement and has taken whatever measures necessary to obtain all required approvals or consents in order for it to execute this Agreement. The representatives signing this Agreement on behalf of the Participants affirm that they have been properly authorized and empowered to enter into this Agreement on behalf of the Participant.
 - iii. **Compliance with this Agreement.** Except to the extent prohibited by applicable law, each Participant shall comply fully with all provisions of this Agreement. To the extent that a Participant delegates its duties under this Agreement to a third party (by contract or otherwise) and such third party will have access to Protected Information, that delegation shall be in writing and require the third party, prior to exchanging Protected Information with any Participants, to agree to the same restrictions and conditions that apply through this Agreement to a Participant.
 - iv. **Agreements with Authorized Users.** Each Participant has valid and enforceable agreements with each of its Authorized Users that require the Authorized User to,

at a minimum: (i) comply with all applicable law; (ii) reasonably cooperate with the Participant on issues related to this Agreement; (iii) exchange Protected Information only for a permitted purpose; (iv) use Protected Information received from another Participant or Authorized User in accordance with the terms and conditions of this Agreement; (v) as soon as reasonably practicable after determining that a Breach occurred, report such Breach to the Participant; and (vi) refrain from disclosing to any other person any passwords or other security measures issued to the Authorized User by the Participant. Notwithstanding the foregoing, for Authorized Users who are employed by a Participant or who have agreements with the Participant which became effective prior to the Effective Date, compliance with this Section 7.b.iv may be satisfied through written policies and procedures that address items (i) through (vi) of this Section 7.b.iv so long as the Participant can document that there is a written requirement that the Authorized User must comply with the policies and procedures.

- v. **Agreements with Technology Partners.** To the extent that a Participant uses technology partners in connection with the Participant's exchange of Protected Information, each Participant affirms that it has valid and enforceable agreements with each of its technology partners, including HSPs, that require the technology partner to, at a minimum: (i) comply with applicable law; (ii) protect the privacy and security of any Protected Information to which it has access; (iii) as soon as reasonably practicable after determining that a Breach occurred, report such Breach to the Participant; and (iv) reasonably cooperate with the other Participants to this Agreement on issues related to this Agreement, under the direction of the Participant.
- vi. **Compliance with Specifications, Policies and Procedures.** Each Participant affirms that it fully complies with the Technical Cooperation provisions in Attachment 1 hereto and such other Specifications and the Operating Policies and Procedures as OHIT may from time to time adopt in consultation with the Participants.
- vii. **Creation of Test Data.** Certain Participants agreed to anonymize PHI to create Test Data to be used by other Participants for testing. Any Test Data that has been created, or will be created in the future, shall not contain PHI and has been, or will be, created in accordance with a testing plan to be approved by OHIT and the Participant.
- viii. **Accuracy of Message Content.** Participant hereby represents that at the time of transmission, the Protected Information it provides is (a) an accurate representation of the data contained in, or available through, its System, (b) sent from a System that employs security controls that meet industry standards so that the information and Protected Information being transmitted are intended to be free from malicious software, and (c) provided in a timely manner and in accordance with the with the Technical Cooperation provisions in Attachment 1 hereto and such other Specifications and the Operating Policies and Procedures as OHIT may from time to time adopt in consultation with the Participants. Other than as expressly provided herein, Participant makes no other representation, express or implied, about transmitted Protected Information.
- ix. **Express Warranty of Authority to Exchange Protected Information.** To the extent each Participant is providing Protected Information, each Participant represents and warrants that it has sufficient authority to exchange such Protected Information.

- x. **Use of Message Content.** Each Participant hereby represents and warrants that it shall use the Protected Information only in accordance with the provisions of this Agreement.
 - xi. **Compliance with Laws.** Each Participant shall, at all times, fully comply with all applicable law relating to this Agreement, the exchange of Protected Information for a permitted purpose and the use of Protected Information.
 - xii. **Absence of Final Orders.** Each Participant hereby represents and warrants that, as of the Effective Date, it is not subject to a final order issued by any Federal, State, local or international court of competent jurisdiction or regulatory or law enforcement organization, which will materially impact the Participant's ability to fulfill its obligations under this Agreement. Each Participant shall inform OHIT if at any point during the term of this Agreement it becomes subject to such an order.
 - xiii. **Federal Program Participation.** Each Participant hereby represents and warrants that it is not excluded, debarred, or otherwise ineligible from participating in Federal contracts, subcontracts, grants, and nonprocurement transactions ("Federal Programs"). Each Participant shall immediately provide written notice to OHIT if it is suspended, proposed for debarment or other exclusion, or otherwise disqualified or declared ineligible from participating in a Federal Program for any reason, or is a party to a legal proceeding that may result in any such action.
- c. **OHIT Services disclaimer.** OHIT MAKES NO EXPRESS OR IMPLIED REPRESENTATIONS OR WARRANTIES WITH RESPECT TO THE SERVICES, OR ILHIE OR THEIR PERFORMANCE, CONDITION, MERCHANTABILITY, FITNESS FOR ANY PARTICULAR PURPOSE OR USE BY PARTICIPANT. The Services and the ILHIE are provided "as is". OHIT does not warrant that the Services or the operation of ILHIE will be uninterrupted or error free. ALL OTHER WARRANTIES AND REPRESENTATIONS ARE HEREBY DISCLAIMED.
- d. **Third party services disclaimers.**
- i. **Third Party Applications.** The ILHIE may from time to time serve as a platform for third party software, services or content which may be offered to Participants for their acquisition or use at their option in their absolute discretion ("Third Party Applications"). OHIT shall not endorse or recommend any Third Party Applications, and OHIT MAKES NO EXPRESS OR IMPLIED REPRESENTATIONS OR WARRANTIES WITH RESPECT TO ANY THIRD PARTY APPLICATIONS OR THEIR PERFORMANCE, CONDITION, MERCHANTABILITY, FITNESS FOR ANY PARTICULAR PURPOSE OR USE BY PARTICIPANT. Any opinions, advice, statements, services, offers, or other information or content expressed or made available by third parties, including information provided by Participants or Authorized Users, or others, with respect to any Third Party Application are those of the respective author(s) or distributor(s) and do not necessarily state or reflect those of OHIT and shall not be used for advertising or product endorsement purposes.
 - ii. **Carrier lines.** All Participants acknowledge that the exchange of Protected Information between Participants is to be provided over various facilities and communications lines, and information shall be transmitted over local exchange and Internet backbone carrier lines and through routers, switches, and other

devices (collectively, “carrier lines”) owned, maintained, and serviced by third-party carriers, utilities, and Internet service providers, all of which may be beyond the Participants’ control. Provided OHIT and a Participant uses reasonable security measures, no less stringent than those directives, instructions, and specifications contained in this Agreement, OHIT and the Participants assume no liability for or relating to the integrity, privacy, security, confidentiality, or use of any information while it is transmitted over those carrier lines, which are beyond OHIT’s or the Participants’ control, or any delay, failure, interruption, interception, loss, transmission, or corruption of any Protected Information or other information attributable to transmission over those carrier lines which are beyond OHIT’s or the Participants’ control. Use of the carrier lines is solely at the Participants’ risk and is subject to all applicable law.

e. **Data quality and patient care disclaimers.**

- i. **Reliance on a System.** Each Participant acknowledges and agrees that: (i) the Protected Information provided by, or through, its System is drawn from numerous sources, and (ii) it can only confirm that, at the time Protected Information is exchanged, the information and Protected Information exchanged are an accurate representation of data contained in, or available through, its System. Nothing in this Agreement shall be deemed to impose responsibility or liability on OHIT or a Participant related to the clinical accuracy, content or completeness of any Protected Information provided pursuant to this Agreement. The Participants acknowledge that other Participants’ ILHIE participation may be activated, suspended or revoked at any time or the Participant may suspend its participation; therefore, Participants may not rely upon the availability of a particular Participant’s Protected Information.
- ii. **Incomplete Medical Record.** Each Participant acknowledges that Protected Information exchanged by Participants may not include the individual’s full and complete medical record or history. Such Protected Information will only include that data which is the subject of the message and available for exchange among Participants.
- iii. **Patient Care.** Protected Information obtained through ILHIE is not a substitute for any Participant or Authorized User, if that person/entity is a health care provider, obtaining whatever information he/she/it deems necessary, in his/her professional judgment, for the proper treatment of a patient. The Participant or Authorized User, if he/she/it is a health care provider, shall be responsible for all decisions and actions taken or not taken involving patient care, utilization management, and quality management for his/her/its respective patients and clients resulting from, or in any way related to, the use of the ILHIE pursuant to this Agreement or the Protected Information made available thereby. None of the Participants nor OHIT, by virtue of executing this Agreement, assume any role in the care of any patient.
- iv. **Clinical use.** Without limiting any other provision of this Agreement, Participant and Authorized Users shall be solely responsible for all decisions and actions taken or not taken involving patient care, utilization management, and quality management for their respective patients and clients resulting from or in any way related to the use of Protected Information. Participant or Authorized User shall not have any recourse against, and each shall waive any claims against, Other Participants and OHIT for any loss, damage, claim or cost relating to or resulting from its own use or misuse of Protected Information.

- v. **Data limitations.** Participant and not OHIT shall have sole responsibility for the accuracy, quality, integrity, reliability, appropriateness, and intellectual property ownership or right to use of all of the Participant’s data submitted to OHIT, and OHIT shall not be responsible or liable for the deletion, correction, destruction, damage, loss or failure to store any such data, subject to HIPAA and any other applicable federal or state law. OHIT makes no representations or warranties as to the accuracy or completeness of the data obtained by Participant through the ILHIE and disclaims responsibility for any errors caused by inaccuracies or incompleteness of such data. Participant hereby waives, and covenants not to sue OHIT for, any and all possible claims that it might have against OHIT arising out of, or resulting from, the operation of the ILHIE.
- f. **Participant disclaimer.** PARTICIPANT DISCLAIMS ALL IMPLIED AND EXPRESS WARRANTIES, CONDITIONS AND OTHER TERMS, WHETHER STATUTORY OR COMMON LAW, ARISING FROM COURSE OF DEALING OR OTHERWISE. PARTICIPANT DOES NOT WARRANT THAT (I) THE PERFORMANCE OF A SYSTEM OF DELIVERY OF THE PROTECTED INFORMATION WILL BE UNINTERRUPTED OR ERROR FREE OR (II) THE CONTENT OF THE PROTECTED INFORMATION WILL BE UNINTERRUPTED OR ERROR FREE.
- g. **Limitation of Liability.**
 - i. **Cap on OHIT’s Damages.** In no event shall the amount of damages of any type owed by OHIT to Participant for any claim against OHIT in connection with the Agreement, including any obligations arising from the attached business associate agreement, exceed Participant’s Allocated Portion of any Vendor Payment (described below).
 - ii. **Vendor Breach.**
 - 1. **Definitions.** A breach by OHIT of this Agreement may be due to breach by a vendor of its obligations to OHIT (a “Vendor Breach”) and OHIT may be able to recover damages from the vendor for a Vendor Breach. The amount OHIT recovers for a Vendor Breach, net of legal fees and expenses incurred to obtain such a recovery, may be referred to as the “Vendor Payment.”
 - 2. **Good Faith.** OHIT shall act in good faith in determining whether to seek damages for a Vendor Breach, whether to settle claims for Vendor Breach and the terms of any settlement, taking into account many factors including, without limitation, the expected legal fees and costs of pursuing such claims, the time to resolve them and the possible adverse impact on operations of ILHIE as a whole. OHIT does not provide any assurance or guarantee that it shall be able to recover any damages in the event of a Vendor Breach.
 - 3. **Allocated Portion.** The amount recoverable from OHIT for damages due to a Vendor Breach shall be limited to the Participant’s Allocated Portion of any Vendor Payment. “Allocated Portion” means a percentage calculated by OHIT in good faith to determine a reasonable allocation of any Vendor Payment among all Participants and OHIT itself to the extent that any or all of them have sustained actual damages

as a result of a Vendor Breach for which a Vendor Payment has been received. The Allocated Portion may take into account the damages incurred by Participants that have not yet asserted a claim and the extent to which Participant has satisfied (or failed to satisfy) its other obligations under the Agreement. The Allocated Portion may be reduced to reflect amounts that Participant then owes to OHIT (e.g., for unpaid fees). If the Vendor Payment includes a credit for future license fees or services, the Allocated Portion may include a portion of such credit rather than a monetary payment.

- h. **Consequential damages.** As represented in section 7(k) of the Agreement, in no event shall either party be liable to the other or to any other Participant for any special, indirect, consequential, exemplary or punitive damages, arising out of any acts or omissions relating to this Agreement, including but not limited to, loss of profits or revenues, loss of use, or loss of information or data or claims arising from any delay, omission or error in the ILHIE or receipt of message content and whether a claim for any such liability or damages is premised upon breach of contract, breach of warranty, negligence, strict liability, or any other theories of liability, and whether or not such party has been apprised of the possibility or likelihood of such damages occurring.
- i. **Mitigation.** Each party shall use commercially reasonable efforts to mitigate any damages it might suffer as the result of the other party's breach; provided, however, that in determining what mitigation is commercially reasonable for OHIT, it shall not be required to take any action that would adversely affect Other Participants or the ILHIE as a whole even if such actions would reduce the amount of damage it might incur from Participant's breach or might reduce the amount of damage suffered by Participant.
- j. **Non-Exclusive Remedies.** Nothing in this Agreement shall be construed to restrict any party's right to pursue all remedies available under applicable law for damages or other relief arising from acts or omissions related to this Agreement, or to limit any rights, immunities or defenses to which a party may be entitled under applicable law.
- k. **Participant Indemnification.** To the extent permitted by applicable law, Participant hereby agrees to indemnify and hold harmless OHIT and its officers, directors, affiliates, agents and contractors from and against any demand, suit, action, or proceeding brought by any third party and any and all related damages, expenses, including reasonable attorneys fees and settlement costs, as applicable (collectively "Losses"), from such portions of any demand, suit, action, or proceeding to the extent that the Losses arose from:
 - (a) Participant's or its Authorized User's material breach of this Agreement;
 - (b) violation of applicable law;
 - (c) any claim of third parties (including, without limitation, government authorities and/or patients) arising from or with respect to the failure of Participant or its Authorized Users to comply with the opt-out and consent procedures set forth in Section 3.c to the extent applicable; and/or

- (d) any other claim of a third party (including patients) arising from or in connection with ILHIE except to the extent that such claim arises from OHIT's breach of its obligations under this Agreement.

1. **Process for Indemnification.** With respect to all indemnification pursuant to this Agreement, the party entitled to receive indemnification (the "Indemnified Party") shall provide the party with the obligation to indemnify (the "Indemnifying Party") with: (a) prompt written notice of the claim, demand, suit, action or proceeding (collectively, the "Claim"); (b) sole authority to defend or settle the Claim (except the authority to bind the Indemnified Party to perform any act or pay any sum and except where the resolution names any Indemnified Party as culpable without such party's advance written consent); and (c) reasonable assistance in defending the Claim at the Indemnifying Party's expense. The Indemnified Party shall have the right to retain counsel of its own choosing at its sole cost at any time except that the Indemnified Party's legal expenses in exercising this right shall be subject to indemnification only to the extent that: (x) the Indemnifying Party fails or refuses to assume control over the defense of the Claim within a reasonable time period; (y) the Indemnified Party deems it reasonably necessary to file an answer or take similar action to prevent the entry of a default judgment, temporary restraining order, or preliminary injunction against it; or (z) representation of the Indemnified Party and the Indemnifying Party by the same counsel would, in the opinion of that counsel, constitute a conflict of interest.
- m. **No Indemnification if Prohibited by Law.** The obligation to indemnify under this Agreement shall not apply to Participant if it is barred by applicable law from indemnifying another party as otherwise required by this Agreement.

8. **Intellectual Property License.**

- a. **ILHIE.** OHIT grants to Participant for the term of the Agreement a royalty-free, non-exclusive, nontransferable, non-assignable, non-sub-licensable, and limited right to use the intellectual property used in providing Services for the sole purpose of providing the exchange of and access to health information that is (a) created by healthcare providers located within Illinois or (b) created by healthcare providers located outside of Illinois but accessed by or provided to users located within Illinois.
- b. **Participant System.** Each Participant is hereby granted a limited license to allow its Authorized Users to access and use Other Participant System(s) for the purposes set forth in this Agreement. Upon termination, all licenses granted to a Participant relating to access to or use of the Protected Information will cease.
- c. **Open Source License Restrictions.** The parties acknowledge that certain third party license terms require that computer code be generally (i) disclosed in source code form to third parties; (ii) licensed to third parties for the purpose of making derivative works; or (iii) redistributable to third parties at no charge (collectively, "Open Source License Terms"). The license rights that each party has granted hereunder to any computer code (or any associated intellectual property) do not include any license, right, power or authority to incorporate, modify, combine and/or distribute that computer code with any other computer code in a way that would subject the other's computer code to Open Source License Terms.

9. **Proprietary Information.**

- a. **Non-disclosure.** The Participant acknowledges and stipulates that: (A) during the term of this Agreement, the Participant may be placed in a position to become acquainted with various aspects of the Proprietary Information; (B) the use or disclosure of the Proprietary Information by Participant, except as expressly authorized by the Other Participant for whom the information is Proprietary Information, is prohibited and would cause serious damage; and (C) in addition to being given access to the Proprietary Information, Participant may receive material benefits as a result of this Agreement. Therefore, the Participant agrees as follows:
 - i. During the term of this Agreement and thereafter, Participant shall not, and shall utilize reasonable efforts to ensure that their Authorized Users, agents, employees, and contractors shall not, without the prior written consent of the Other Participant for whom the information is proprietary, directly or indirectly:
 - A. Divulge, furnish or make accessible to any other person, firm, associate, corporation or other entity, or copy, take or use in any manner, any of the Proprietary Information;
 - B. Take any action which might reasonably or foreseeably be expected to compromise the confidentiality or proprietary nature of any of the Proprietary Information; or
 - C. Fail to follow the reasonable requests of the disclosing Participant from time to time regarding the confidential and proprietary nature of the Proprietary Information.
 - ii. The Provisions of this Section 9.a. shall survive the expiration or termination of this Agreement.
- b. **Remedies.** Remedies shall be available to Participant in the event of a breach of the provisions of Section 9.a. according to the following provisions:
 - i. The Participant agrees that a breach by Other Participants of any of the provisions of Section 9.a. of this or materially similar Agreements would cause irreparable damage to the Participant or Other Participants for whom Protected Information is considered confidential. Therefore, Participant shall be entitled to preliminary and permanent injunctions restraining any Other Participant and/or its Authorized Users, agents, employees and contractors from committing actions provided for in the provisions of Section 9.a. The existence of any claim or cause of action on the part of the Participant or Other Participant and/or its Authorized Users, agents, employees or contractors against the aggrieved Participant or Other Participant, whether arising from this Agreement or otherwise, shall not constitute a defense to the granting or enforcement of this injunctive relief.
 - ii. The remedies available to Participant under this Agreement are cumulative. Participant may, at its sole discretion, elect to pursue all or any of such remedies. Such remedies are in addition to any others given by law or in equity and may be enforced successively or concurrently.
 - iii. The provisions of this Section 9.b. shall survive the expiration or termination of this Agreement.
- c. **Reasonably required.** Participant has carefully read and considered the provisions of this Agreement and agree that the restrictions set forth in this Agreement, particularly those in Sections 9.a. and b., are reasonably required for the protection of all Other Participants of the ILHIE.

- d. **Sanctions.** Participant shall apply appropriate sanctions against its Authorized Users, employees, agents and contractors with access to the Proprietary Information who fail to comply with the requirements of this Section. The type and severity of sanctions applied shall be in accordance with the Participant's confidentiality and disciplinary policies.
 - e. **Use of Marks.** Neither OHIT nor Participant shall directly or indirectly hold itself out as or otherwise create the impression that it is sponsored, authorized, endorsed by, affiliated with, or an agent of the other party or affiliate or successor thereof, including but not limited to using the name "ILHIE" or the name of Participant or OHIT, or of any affiliate, or any colorable imitation thereof, or as part of, any ILHIE Service or trade name (collectively, the "Marks") or in any other confusing or misleading manner without the written consent of the other party. The parties acknowledge that all Marks are the exclusive property of the party that is lawfully registered to hold such Marks. Participant may utilize OHIT's Marks with OHIT's prior consent, and as long as it complies with all policies and procedures pertaining to this use prescribed by OHIT from time to time. Participant shall not use the Marks for any other purpose without the express written consent of OHIT.
10. **Agreement's Compliance with Laws and Regulations.** The Participant intends and in good faith believes that this Agreement complies with all federal, State and local laws. If any provision of this Agreement is declared void by a court or arbitrator, or rendered invalid by any law or regulation, and if such provision is necessary to effectuate the purposes of this Agreement, the Participant agrees to attempt to renegotiate in good faith the Agreement to comply with such law(s).
11. **Insurance.** Participant agrees to obtain and maintain in force and effect reasonable policies of liability insurance or self-insurance to insure itself and its employees, agents, and contractors for liability arising out of activities to be performed under, or in any matter related to, this Agreement. Upon reasonable request Participant shall provide relevant information regarding its policies of insurance including, without limitation, coverage limits.
12. **Notices.** Any notice or other communication required under this Agreement shall be in writing and sent to such address as the Participant shall designate in writing. Notices or communications to or between the Participant and Other Participants shall be considered to have been delivered: (a) two (2) business days after deposit in the mail when mailed by first class mail, or one (1) business day after transmission as an email, provided that notice of default or termination shall be sent by registered or certified mail; (b) within five (5) days if sent by established courier service; or (c) when received, if personally delivered.
13. **Subrogation.** In the event that Participant (the "Substitute Participant") shall suffer damages due to the actions or omissions of the Other Participant and/or a Person to whom any Other Participant (the "Replaced Participant") has disclosed directly or indirectly (whether by an Authorized User, employee, agent, contractor or other of the Replaced Participant) Protected Information, the Substitute Participant shall be granted a right of subrogation to bring any and all available claims against the Other Participant and/or Person for any damages suffered or likely to be suffered by the Substitute Participant. The Substitute Participant may bring claims against the Other Participant and/or Person as though it were the Replaced Participant and/or OHIT, regardless of whether such claims are tort, contract, equity and/or any other type of claim.
14. **Governing Law.** In the event of any dispute arising out of this Agreement: the Participant or Other Participant receiving and providing Protected Information will be held liable to abide by

the law of the State of Illinois and federal law. A reference in this Agreement to a section in a federal, State, or local statute, law, or regulation means the section as in effect or as amended.

15. **Other Participants.** Upon OHIT’s acceptance of any Other Participant in the ILHIE, OHIT shall require such Other Participant to execute and become bound by an agreement materially similar to this Agreement. Upon execution of the materially similar agreement, such party will become an “Other Participant.”
16. **Amendment.**
 - a. Except as provided in Section 16(b), this Agreement may not be modified, altered, or amended except by written instrument duly executed by Participant and OHIT.
 - b. OHIT reserves the right to amend this Agreement without the Participant’s consent by providing written notice of such amendment for the following purposes: (1) as required by federal or state law; (2) as may be required for ILHIE to participate in the Nationwide Health Information Network (NwHIN) or to comply with the requirements of the Department of Health and Human Services Office of National Coordinator for Health Information Technology or any other federal government authority (collectively “ONC”) relating to the utilization by OHIT or ILHIE of federal grant funding; (3) for the mitigation of privacy and security matters; and, (4) non-material changes that do not alter the material rights and obligations of the Participant or OHIT under this Agreement.
 - i. All such amendments made under Section 16(b) shall also apply to the agreements of Other Participants unless barred by federal or state law or the circumstances make it not reasonable for adjustments to be made to those agreements.
 - ii. At least thirty (30) days advance written notice shall be given for amendments required by federal or state law, or to accommodate NwHIN or ONC requirements, or for privacy and security mitigation amendments, except if the change in applicable law is effective sooner or the circumstances require less notice to address urgent regulatory and privacy and security matters.
 - iii. For non-material amendments, OHIT shall provide notice to the Participant in the form of a revised Agreement and allow the Participant to make objections within fifteen (15) days of receipt of the revised Agreement.
17. **Assignment.** Participant shall not assign this Agreement, or any of the rights or obligations contained in this Agreement, without the prior review and written consent of OHIT. Any such assignment without OHIT’s written consent shall be void and have no binding effect. This Agreement shall be binding on the Participant, its successors and permitted assigns. Notwithstanding the foregoing, OHIT shall be authorized without further consent of Participant to assign this Agreement in whole or in part to the Illinois Health Information Exchange Authority (“Authority”), in furtherance of the Authority’s rights and duties under Illinois law, including the Illinois Health Information Exchange and Technology Act (20 ILCS 3860/).
18. **Waiver.** No failure or delay by Participant or OHIT in exercising its rights under this Agreement shall operate as a waiver of such rights or estop enforcement of those rights, and no waiver of any breach shall constitute a waiver of any prior, concurrent, or subsequent breach or estop enforcement of those rights.
19. **Integration.** This Agreement sets forth the entire and only agreement between the Participant and OHIT relative to the subject matter of this Agreement. Any representations, promise, or condition, whether oral or written, not incorporated in this Agreement shall not be binding upon the Participant.

20. **Incorporation by Reference.** All exhibits attached to this Agreement are incorporated by reference and made part of this Agreement as if those exhibits were set forth in the text of this Agreement.
21. **Severability.** If any portion of this Agreement shall for any reason be invalid or unenforceable, such portion shall be ineffective only to the extent of such invalidity or unenforceability, and the remaining portions shall remain valid and enforceable and in full force and effect.
22. **Relationship of Participants.** Nothing contained in this Agreement shall constitute, or be construed to create, a partnership, joint venture, agency or any other relationship other than that of independent contractors to this Agreement.
23. **Third-Party Beneficiaries.** This Agreement does not and will not create in any natural person, corporation, partnership or other organization other than the Participant any benefits or rights, and this Agreement will be effective only as to the Participant and its successors and permitted assigns.
24. **Force Majeure.** Notwithstanding any provisions of this Agreement to the contrary, in the event of a disruption, delay or inability to complete the requirements of this Agreement due in whole or in part to any cause beyond the reasonable control of such party or its contractors, agents or suppliers, including but not limited to utility or transmission failures, failure of phone or data transmission lines or phone or data transmission equipment, power failure, strikes or other labor disturbances, acts of God, floods, fire, natural or other disasters, sabotage, acts of war or terror or other similar events out of the control of Participant, Participant shall not be considered in breach of this Agreement. To the extent that any performance by OHIT under this Agreement depends on the receipt of Federal or State funds, OHIT's failure to receive such Federal or State funds shall also constitute a force majeure event.
25. **Counterparts.** This Agreement may be executed in any number of counterparts, each of which will be considered an original as against the parties whose signature appears thereon, but all of which taken together will constitute one and the same instrument.
26. **Authority to Sign.** The parties warrant that they have the capacity to enter into and perform the obligations under this Agreement and all activities contemplated in the Agreement, and all other corporate and other actions required to authorize it to enter into and perform this Agreement were properly taken.
27. **Survival.** The respective rights and obligations of the Participant under Sections 3.a. (Permitted Uses and Disclosures), 3.c.ii. (Access to Protected Information), 4.d. (audit), 5.e. (HIPAA), 6.f. (Effect of Termination), 7 (Warranties and Limitation of Liability), 9 (Proprietary Information), 13 (Subrogation), and 14 (Governing Law) of this Agreement shall survive the termination of this Agreement.
28. **Technical Cooperation.** OHIT and the Participant have set forth in Attachment 1 hereto their understanding with respect to the nature and terms of any technical cooperation that is envisioned between OHIT and the Participant with respect to the implementation or use of the Services or the ILHIE.
29. **Financial Commitments.** OHIT and the Participant have set forth in Attachment 2 hereto their understanding with respect to the financial terms that will apply with respect to the

implementation or use of the Services or the ILHIE. Unless otherwise expressly provided in Attachment 2 to this Agreement, during the Term of this Agreement the ILHIE Services will be provided without charge.

Each Party has caused this Agreement to be signed by a duly authorized officer below:

**STATE OF ILLINOIS OFFICE OF HEALTH
INFORMATION TECHNOLOGY**

By: _____

Name: _____

Title: _____

Date: _____

By: _____

Name: _____

Title: _____

Date: _____

Attachment 1:

Technical Cooperation

1. Definitions:

- a. “Data” means the patient information gathered by or contributed to the ILHIE by the Participant.
- b. “Data Set” means the Data provided or contributed to ILHIE by Participant and all Other Participants.
- c. “Meaningful Use Regulations” means the regulations as defined by Centers for Medicare & Medicaid Services (42 CR Parts 412, 413, 422 et al.) Medicare and Medicaid Programs; Electronic health Record Incentive Program; Final Rules (published on July 28, 2010 in the Federal Register) and the Office of the National Coordinator for Health Information Technology (45 CFR Part 170) Health Information Technology: Initial Set of Standards, Implementation Specifications, and Certification Criteria for Electronic Health Record Technology; Final Rule (published on July 28, 2010 in the Federal Register).

2. Data Set Access and Use

- a. Participant agrees to participate in the ILHIE by submitting data and utilizing the ILHIE platform in accordance with the terms and conditions herein. The Participant shall not take any actions inconsistent with this Agreement; Participant shall not submit Data to the ILHIE that it is not authorized to submit; and Participant submission of Data will comply with applicable federal, state and local laws. Any violation of the aforementioned terms and conditions by Participant may result in suspension or termination of the Provider’s access to and/or use of the ILHIE.

3. Data Set Content Restrictions and Requirements

- a. Data Set information shall be provided in compliance with the published Data Set requirements of the ILHIE, including but not limited to then-current requirements of the Meaningful Use Regulations. Such Data Set information requirements shall be published on the ILHIE website and may be changed from time to time.

4. Encryption of Data

- a. Participant is responsible for de-identifying and/or encrypting all PHI prior to submission to the ILHIE and is responsible for maintaining the security of any encryption techniques used. Deidentification and encryptions will be done in compliance with federal and state law, including HIPAA and corresponding regulations. ILHIE shall not have any responsibility for the encryption of PHI.

5. Data Retention/Data Security

- a. Participant acknowledges and understands that Data provided as a part of the Data Set shall be archived, stored, maintained, protected, and disposed of in compliance with federal and state law, to the extent state law is not superseded by federal law.

b. Participant is responsible for creating and protecting user passwords and other secure measures used for accessing and using the ILHIE and for establishing its own security protocols and procedures in the use of passwords and administration of the Data Set and any Data Set viewed through the ILHIE. Participant is further responsible for ensuring that PHI is submitted to the ILHIE only as permitted in Sections 2 and 4. Participant will adhere to the data sharing concepts and principles that are developed for the ILHIE. Participant shall maintain written policies and procedures for the transmission of the Data Set and any other information to the ILHIE. The Participant shall be responsible and liable for any misuse or abuse of its passwords and other measures and any resulting misuse or abuse of the ILHIE.

c. Each Party agrees to immediately alert the other Party and, to the extent known to each Party, affected Other Participant(s) if there is a Breach of the security of the ILHIE or the Data Set contained with the ILHIE, or any actual or potential misappropriation or misuse of a Data Set or any Data available through the ILHIE. The Parties further agree to work cooperatively to investigate and comply with any federal and state laws should a Breach occur.

6. Ownership of Data

a. The Participant retains ownership of any Data Sets it contributes to the ILHIE; but, as indicated in Section 3 herein, any Data provided may be subject to continued legal requirements, including but not limited to retention. The Participant has no right to return or destruction of any Data contributed to the ILHIE, unless the initial disclosure was prohibited by federal or state law and such return or destruction is reasonable to perform. The Participant acknowledges that contribution of Data Sets to the ILHIE does not in any way grant the Participant any rights, beyond those provided under this Agreement, to any Data Sets that it may access through the ILHIE or to the ILHIE itself. Furthermore, OHIT acknowledges that the Participant's contribution of a Data Set to the ILHIE does not grant OHIT any rights, beyond those provided under this Agreement, to any Data Sets the Participant chooses not submit to the ILHIE.

b. Promptly upon termination of this Agreement (i) the Participant shall have the right to cease providing additional Data Sets and/or any updates to previously submitted Data Sets and (ii) OHIT may retain Data Sets that have been previously contributed to the ILHIE unless otherwise restricted by federal and state law. Participant may request that any previously submitted Data Sets be removed from the ILHIE and that any Other Participant's access to that specific Data Set be terminated; however, such removal shall be subject to whether the specific Data Set was accessed or used, feasibility of removal, and whether the Data Set is subject to related laws, including retention laws.

7. Compliance with On-Boarding Handbook

a. The Parties agree to use commercially reasonable efforts to comply with the most recent version of the ILHIE Partner On-Boarding Handbook for the on-boarding process.

Participant shall:

1. Participate in planning, implementing, and on-going educational meetings.
2. Participate in the technical discussions with EHR vendor; and develop and execute plans for HIE connectivity, including the use of an integration vendor as needed.
3. Acquire and implement software as may be necessary and associated business processes for testing, validating, and sending MPI data to ILHIE utilizing HL7 V3 PIX profiles.

4. Acquire and implement software as may be necessary for generating testing, validating, and sending continuity of care documents using the HITSP C32 format to ILHIE.
5. Participate in patient consent and privacy practice discussion, and implement workflow adjustments, training, and implementation of modified consent practices as required for disclosure of data to the ILHIE.
6. Implement Direct-compliant secure messaging by December 31, 2013.

OHIT shall:

1. Collaborate with Participant and its EHR vendor to prepare an HIE implementation timeline.
2. Support technical discussions and establishment of ILHIE connectivity with Participant and its EHR vendor.
3. Support the Participant's efforts in the acquisition of software for testing, validating, and sending MPI to ILHIE.
4. Support the Participant's efforts in the acquisition of software for testing, validating, and sending C32 to ILHIE.
5. Support discussions regarding patient consent, privacy practice, and adherence to State policies and assist Participant in modifying its policies and procedures to adhere to those policies.
6. Support and monitor Participant's implementation of Direct-compliant secure messaging.

Attachment 2:

Financial Commitments

Not applicable.

ILHIE Services

Statement of Work shall be attached within ninety (90) days of the execution of this Agreement.

Attachment 3:

Business Associate Agreement

Business Associate Agreement

OHIT agrees that it hereby enters into a Business Associate Agreement with Participant (as defined and required by the Health Information Portability and Accountability Act (“HIPAA”)). References in the Business Associate Agreement herein to “Provider” shall refer to the Participant and/or the person or entity that is a Covered Entity (as defined by HIPAA) with respect to the information disclosed by means of the ILHIE. References in the Business Associate Agreement herein to “Agency” shall mean OHIT.

OHIT- Participant (Covered Entity) Business Associate Agreement

Marketing.

1. Definition. Marketing is any communication by the Agency about a product or service that encourages the recipient of the communication (as defined herein, incorporated by reference and made a part hereof) to purchase or use the product or service, unless the communication is limited to:

- a. Refill reminders or otherwise communications about a drug or biologic that is currently being prescribed for the individual, only if any financial remuneration received by the covered entity in exchange for making the communication is reasonably related to the covered entity’s cost of making the communication
- b. For the following treatment and health care operations purposes, except where the covered entity receives financial remuneration in exchange for making the communication:
 - i) For treatment of an individual by a health care provider, including case management or care coordination for the individual, or to direct or recommend alternative treatments, therapies, health care providers, or settings of care to the individual;
 - ii) To describe a health-related product or service (or payment for such product or service) that is provided by, or included in a plan of benefits of, the covered entity making the communication, including communications about: the entities participating in a health care provider network or health plan network; replacement of, or enhancements to, a health plan; and health-related products or services available only to a health plan enrollee that add value to, but are not part of, a plan of benefits; or
 - iii) For case management or care coordination, contacting of individuals with

information about treatment alternatives, and related functions to the extent these activities do not fall within the definition of treatment.

2. Authorization.

a. The Agency must obtain an authorization for any use or disclosure of protected health information (as defined herein) for marketing, except if the communication is in the form of: face to face communication made by the Agency to the individual, or a promotional gift of nominal value provided by the Agency.

b. If the marketing involves direct or indirect remuneration to the Agency from a third party, the authorization shall state that such remuneration is involved.

Termination for Breach of HIPAA Compliance Obligations.

The Agency shall comply with the terms of the HIPAA Compliance Obligations set forth herein. Upon the Provider's learning of a material breach of the terms of the HIPAA Compliance Obligations set forth herein, the Provider shall:

1. Provide the Agency with an opportunity to cure the breach or end the violation, and terminate this Agreement if the Agency does not cure the breach or end the violation within the time specified by the Provider; or
2. Immediately terminate this Agreement if the Agency has breached a material term of the HIPAA Compliance Obligations and cure is not possible; or
3. Report the violation to the Secretary of the United States Department of Health and Human Services, if neither termination nor cure by the Agency is feasible.

Retention of HIPAA Records.

The Agency shall maintain for a minimum of six (6) years documentation of the protected health information disclosed by the Agency, and all requests from individuals for access to records or amendment of records, pursuant to this Agreement, in accordance with 45 CFR § 164.530(j).

HIPAA Compliance Obligations.

The Agency and the Provider shall comply with the terms of the HIPAA Compliance Obligations set forth herein. If the Agency materially breaches the terms of the HIPAA Compliance Obligations, the Provider may require a cure or terminate this Agreement, as provided herein.

A. Definitions.

1. "Designated Record Set" shall have the same meaning as the term "designated record set" in 45 CFR § 164.501.

2. “Individual” shall have the same meaning as the term “individual” in 45 CFR § 160.103 and shall include a person who qualifies as a personal representative in accordance with 45 CFR § 164.502(g).
3. “PHI” means Protected Health Information, which shall have the same meaning as the term “protected health information” in 45 CFR § 160.103, limited to the information created or received by the Agency from or on behalf of the Provider.
4. “Privacy Rule” shall mean the Standards for Privacy of Individually Identifiable Health Information at 45 CFR Part 160 and 45 CFR Part 164 subparts A and E.
5. “Required by law” shall have the same meaning as the term “required by law” in 45 CFR § 164.103.

B. Agency's Permitted Uses and Disclosures.

1. Except as otherwise limited by this Agreement, the Agency may use or disclose PHI to perform functions, activities, or services for, or on behalf of, the Provider as specified in this Agreement, provided that such use or disclosure would not violate the Privacy Rule if done by the Provider.
2. Except as otherwise limited by this Agreement, the Agency may use PHI for the proper management and administration of the Agency or to carry out the legal responsibilities of the Agency.
3. Except as otherwise limited by this Agreement, the Agency may disclose PHI for the proper management and administration of the Agency, provided that the disclosures are required by law, or the Agency obtains reasonable assurances from the person to whom the PHI is disclosed that the PHI will remain confidential and used or further disclosed only as required by law or for the purpose for which it was disclosed to the person. The Agency shall require the person to whom the PHI was disclosed to notify the Agency of any instances of which the person is aware in which the confidentiality of the PHI has been breached.
4. Except as otherwise limited by this Agreement, the Agency may use PHI to provide data aggregation services to the Provider as permitted by 45 CFR § 164.504(e)(2)(i)(B).
5. The Agency may use PHI to report violations of law to appropriate federal and state authorities, consistent with 45 CFR § 164.502(j)(1).

C. Limitations on Agency's Uses and Disclosures.

The Agency shall:

1. Not use or further disclose PHI other than as permitted or required by this Agreement or as required by law;

2. Use appropriate safeguards to prevent use or disclosure of PHI other than as provided for by this Agreement;
3. Mitigate, to the extent practicable, any harmful effect that is known to the Agency of a use or disclosure of PHI by the Agency in violation of the requirements of this Agreement;
4. Report to the Provider any use or disclosure of PHI not provided for by this Agreement of which the Agency becomes aware, and its risk assessment of the compromise according to the factors laid out in 45 CFR § 164.402 of the HIPAA regulations;
5. Ensure that any agents, including a subcontractor, to whom the Agency provides PHI received from the Provider or created or received by the Agency on behalf of the Provider, agree to the same restrictions and conditions that apply through this Agreement to the Agency with respect to such information;
6. Provide access to PHI in a Designated Record Set to the Provider or to another individual whom the Provider names, in order to meet the requirements of 45 CFR § 164.524, at the Provider's request, and in the time and manner specified by the Provider;
7. Make available PHI in a Designated Record Set for amendment and to incorporate any amendments to PHI in a Designated Record Set that the Provider directs or that the Agency agrees to pursuant to 45 CFR § 164.526 at the request of the Provider or an individual, and in a time and manner specified by the Provider;
8. Make the Agency's internal practices, books, and records, including policies and procedures and PHI, relating to the use and disclosure of PHI received from the Provider or created or received by the Agency on behalf of the Provider available to the Provider and to the Secretary of Health and Human Services for purposes of determining the Provider's compliance with the Privacy Rule;
9. Document disclosures of PHI and information related to disclosures of PHI as would be required for the Provider to respond to a request by an individual for an accounting of disclosures of PHI in accordance with 45 CFR § 164.528;
10. Provide to the Provider or to an individual, in a time and manner agreed to by the Agency and the Provider, information collected in accordance with the terms of this Agreement to permit the Provider to respond to a request by an individual for an accounting of disclosures of PHI in accordance with 45 CFR § 164.528;
11. Return or destroy all PHI received from the Provider or created or received by the Agency on behalf of the Provider that the Agency still maintains in any form, and to retain no copies of such PHI, upon termination of this Agreement for any reason. If such return or destruction is not feasible, the Agency shall provide the Provider with notice of such purposes that make return or destruction infeasible, and upon the parties' written agreement that return or destruction is infeasible, the Agency shall extend the protections of the Agreement to the PHI and limit further uses and disclosures to those purposes that make the return or destruction of the PHI infeasible.

This provision shall apply equally to PHI that is in the possession of the Agency and to PHI that is in the possession of subcontractor or agents of the Agency.

D. Provider Obligations. The Provider shall:

1. Provide the Agency with the Provider's Notice of Privacy Practices and notify the Agency of any changes to said Notice;
2. Notify the Agency of any changes in or revocation of permission by an individual to use or disclose PHI, to the extent that such changes may affect the Agency's permitted or required uses and disclosures of PHI;
3. Notify the Agency of any restriction to the use or disclosure of PHI that the Provider had agreed to in accordance with 45 CFR § 164.522, to the extent that such restriction may affect the Agency's use or disclosure of PHI;
4. Not request that the Agency use or disclose PHI in any manner that would not be permissible under the Privacy Rule if done by the Provider.

E. Breach Requirements.

1. Sections 164.308, 164.310, 164.312 and 164.316 of title 45, Code of Federal Regulations, apply to the Agency in the same manner that such sections apply to the Provider. The Agency's obligations include but are not limited to the following:
 - a. Implementing administrative, physical, and technical safeguards that reasonably and appropriately protect the confidentiality, integrity, and availability of the electronic Protected Health Information that the Agency creates, receives, maintains, or transmits on behalf of the covered entity as required by HIPAA;
 - b. Ensuring that any agent, including a sub the Agency, to whom the Agency provides such information, agrees to implement reasonable and appropriate safeguards to protect the data; and
 - c. Reporting to the Provider any security incident of which it becomes aware and conducting the necessary investigation and risk assessment according to 45 CFR § 164.402 to determine if PHI was compromised.
2. Privacy Obligations. To comply with the privacy obligations imposed by HIPAA, the Agency agrees to:
 - a. Abide by any Individual's request to restrict the disclosure of Protected Health Information consistent with the requirements of Section 13405(a) of the HITECH Act;

- b. Use appropriate safeguards to prevent use or disclosure of the information other than as provided for by this Agreement;
 - c. Report to the Provider any use or disclosure of the information not provided for by the Underlying Agreement of which the Agency becomes aware;
 - d. Ensure that any agents, including a sub the Agency, to whom the Agency provides Protected Health Information received from the Provider or created or received by the Agency on behalf of the Provider, agrees to the same restrictions and conditions that apply to the Agency with respect to such information;
 - e. Make available to the Provider within ten (10) calendar days Protected Health Information to comply with an Individual's right of access to their Protected Health Information in compliance with 45 C.F.R. § 164.524 and Section 13405(f) of the HITECH Act;
 - f. Make available to the Provider within fifteen (15) calendar days Protected Health Information for amendment and incorporate any amendments to Protected Health Information in accordance with 45 C.F.R. § 164.526;
 - g. Make available to the Provider within fifteen (15) calendar days the information required to provide an accounting of disclosures in accordance with 45 C.F.R. § 164.528 and Section 13405(c) of the HITECH Act;
 - h. To the extent practicable, conduct a risk assessment on the compromise of PHI according to 45 CFR § 164.402 and mitigate any harmful effects that are known to the Agency of a use or disclosure of Protected Health Information or a Breach of Unsecured Protected Health Information in violation of this Agreement;
 - i. Use and disclose an Individual's Protected Health Information only if such use or disclosure is in compliance with each and every applicable requirement of 45 C.F.R. § 164.504(e);
 - j. Refrain from exchanging any Protected Health Information with any entity of which the Agency knows of a pattern of activity or practice that constitutes a material breach or violation of HIPAA;
 - k. To comply with Section 13405(b) of the HITECH Act when using, disclosing, or requesting Protected Health Information in relation to this Agreement by limiting disclosures as required by HIPAA.
3. Breach Notification. In the event that the Agency discovers a Breach of Unsecured Protected Health Information, the Agency agrees to take the following measures within 10 calendar days after the Agency first becomes aware of the incident:

- a. To notify, in written form, the Provider and all Other Participants of any incident involving the acquisition, access, use or disclosure of Unsecured Protected Health Information in a manner not permitted under 45 C.F.R. parts D and E. Such notice by the Agency shall be provided after the Agency first becomes aware of the incident, except where a law enforcement official determines that a notification would impede a criminal investigation or cause damage to national security. For purposes of clarity for this provision, the Agency must notify the Provider of any such incident within the above timeframe even if the Agency has not conclusively determined within that time that the incident constitutes a Breach as defined by HIPAA. The Agency is deemed to have become aware of the Breach as of the first day on which such Breach is known or reasonably should have been known to such entity or associate of the Agency, including any person other than the individual committing the Breach, that is an employee, officer or other agent of the Agency or an associate of the Agency;
- b. To include the names of the Individuals whose Unsecured Protected Health Information has been, or is reasonably believed to have been, the subject of a Breach;
- c. To include documentation of the risk assessment of the Breach using the factors laid out in 45 CFR § 164.402 of the HIPAA regulations; and,
- d. To include for the Provider a sample copy of the notice that was used to inform individuals about the breach.

4. Notification Duty. It is the Agency's duty to provide the Breach notification to the affected individuals unless Provider agrees to provide the Breach notification.

5. Costs. The Agency assumes all costs for providing Breach notification unless Provider agrees to assume any costs.

6. Security Rule Compliance. The Agency shall comply with the Security Rule's administrative, physical and technical safeguard requirements. As part of compliance with the Security Rule, the Agency shall develop and implement written security policies and procedures with respect to the electronic PHI they handle. By signing this Agreement, the Agency assures and acknowledges compliance with the requirements of HITECH including meeting the administrative, physical and technical safeguard requirements of the HIPAA Security Rule. (45 CFR Part 160, 162, 164.) The Agency also assures and acknowledges that the electronic PHI they transmit is encrypted and that it will adopt internal procedures for reporting breaches and mitigating potential damages.

F. Interpretation. Any ambiguity in this Agreement shall be resolved in favor of a meaning that permits the Provider to comply with the Privacy Rule.